IN THE CIRCUIT COURT OF CLARKE COUNTY, VIRGINIA

Hon. T. W. Harrison, Judge.

June 10, 1904.

R. H. FRASIER v. NORFOLK & WESTERN RAILWAY COMPANY.*

BILL OF LADING, NOT TO BE VARIED BY PAROL—DEMURRER—SHIPPER SIGNING BILL OF LADING WITHOUT READING IT.

1. A bill of lading issued by a carrier is both a receipt and a contract and, like other contracts in writing, may not be varied by parol in the absence of clear and convincing evidence of fraud, accident or mistake.
2. A declaration, averring that plaintiff delivered to defendant, a carrier by railroad, certain cattle requesting that they be consigned to a certain point, and that the bill of lading which was signed by plaintiff and delivered to him before the shipment left the point of consignment, provided that the cattle should be consigned to another and a different point and setting up an alleged mistake of the agent of the carrier in inserting the wrong destination in the bill of lading, is demurrable for failure to disclose such circumstances as would justify parol evidence to vary the written contract.
3. An averment that plaintiff signed the bill of lading without reading it shows him guilty of negligence, and is demurrable, particularly where the declaration shows, *aliunde*, that at the time of signing, his shipment of live-stock was not actually *in transitu*.

This action, in the Circuit Court of Clarke county, Virginia, was upon a declaration in the following words and figures:

IN THE CIRCUIT COURT OF CLARKE COUNTY, VA.
March Rules, 1st Monday.

R. H. Frasier complains of the Norfolk and Western Railway Company, a corporation under the laws of the state of Virginia, of a plea of trespass on the case; for this, to-wit: that, whereas, the said defendant, before and at the time of the delivery to him of the goods and chattels, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, from the town of Berryville, Virginia, to the city of Lancaster, in the state of Pennsylvania. And, whereas, also whilst the said defendant was such common carrier as aforesaid, the said plaintiff on the 31st day of October, 1903, caused to be delivered to the said defendant twenty-three head (23) of valuable cattle, which cattle, at the request of the plaintiff, were put in a separate car; as soon as said cattle were received by said defendant and put in said car, the

* Reported by Jos. L. Doran.

plaintiff requested the duly authorized agent of the defendant, in charge of the business of defendant, as a common carrier, in the town of Berryville, to consign and deliver said cattle to one John A. Miller, of Lancaster, Pa., for hire, to be paid in Lancaster, Pa., in reply to which request said cattle were accepted on the aforesaid terms, and the said agent stated that he would write down the address and make out the bill of lading later, as he had not time just then to do so, whereupon said agent wrote down the address, which had been given him, and plaintiff saw that said agent had written same down correctly; in about a half-hour after that time, when said agent had the time, he made out the bill of lading and handed same to plaintiff, saying it was the bill of lading for his cattle, which bill of lading was signed and accepted by the plaintiff without being read by him, as he relied on the statement of the aforesaid agent that the same was correct. Instead of making out said bill of lading, as the plaintiff had requested, namely, to John A. Miller, Lancaster, Pa., and as the plaintiff had been given to understand had been done, the said agent of the defendant, by mistake, made out the same to John A. Miller, Greencastle, Penn., and consigned the aforesaid carload of cattle to John A. Miller, Greencastle, Pa.; the defendant carried said carload of cattle from Berryville, Va., to Greencastle, Pa., without the knowledge or consent of the plaintiff; whereupon at the time the defendant should have delivered said carload of cattle to John A. Miller in Lancaster, Pa., plaintiff received a telegram from Greencastle, Pa., stating that said carload of cattle was in Greencastle, with no one to claim same; thereupon plaintiff again advised defendant that he wished his cattle delivered in Lancaster, Pa.

The said defendant, not regarding its duty to deliver the cattle of plaintiff in Lancaster, Pa., in accordance with its oral contract, but, on the contrary thereof, the said defendant, so being such common carrier, as aforesaid, so carelessly and negligently behaved itself in the premises, that by reason of the carelessness, negligence and default of the defendant in the premises, that the cattle of the plaintiff were not delivered in Lancaster, Pa., for two days after the time the same should have been delivered under the aforesaid oral contract with the plaintiff, and in consequence of said delay, the plaintiff was obliged to have his cattle sold in Lancaster, Pa., after the market had closed and when there was very little demand for cattle; and, by reason of the aforesaid delay, the cattle of the plaintiff were greatly damaged, by reason of all of which the plaintiff failed to receive as much for his cattle as he would have sold them for, had not the defendant negligently and carelessly delivered them in Greencastle, Pa., before sending them to Lancaster, Pa.

To the great damage of the plaintiff, to-wit, the sum of Two Hundred and Fifty Dollars ($250.00), which sum the defendant wholly fails to pay, though often requested so to do, therefore, he sues.

CONRAD KOWNSLAR AND F. B. WHITING } p. q.

To this declaration the defendant filed a demurrer in the following words and figures:

IN THE CIRCUIT COURT OF CLARKE COUNTY, VA.

R. H. FRASIER

v.

NORFOLK & WESTERN RAILWAY COMPANY.

The defendant demurs to the plaintiff's declaration, and assigns as grounds of demurrer the following:

1st. That the said declaration does not allege a sufficient cause of action, and, therefore, it is insufficient in law.

2d. That the bill of lading, alleged in the declaration to have been delivered by the defendant to the plaintiff, and by him signed and accepted, but not read, as alleged in the declaration, constituted and was the contract between the defendant and the plaintiff, and the said contract being in writing, it cannot be varied, added to or taken from, and the failure of the plaintiff to read it was no fault of the defendant.

3d. That the said declaration alleges that the defendant's agent wrote down the address of John A. Miller, the consignee of the twenty-three head of cattle in the declaration mentioned, and that the plaintiff saw that the said agent had written down said address correctly, and that thereupon or shortly thereafter, the defendant company, through its agent, delivered to the plaintiff a bill of lading which the plaintiff accepted and signed, which said bill of lading directed the said cattle to be shipped to the said John A. Miller at Greencastle, Pa., and not at Lancaster, Pa., as shown by the declaration, but the plaintiff says he did not read the said bill of lading, whilst he did take care to see that the loose memoradum taken down by the defendant's agent as to the address of the said John A. Miller was correctly taken down.

The declaration further alleges that, by reason of the plaintiff's failure to read the bill of lading, without any averment that he was without opportunity to do so, the said cattle were shipped to Greencastle, Pa., instead of Lancaster, Pa., and so the defendant says by way of demurrer, that the duty of the plaintiff was not only to have read the memorandum taken down by the agent of the address of the consignee, but also to have read his bill of lading, which was then and there delivered to him, and had he done so the same could have been corrected upon the spot, and the cattle shipped to Lancaster, Pa., instead of Greencastle, Pa.

4th. That the contract between the plaintiff and the defendant being in writing, nothing that led up to the making of the contract or anything that was said in the negotiation of its making would be admissible in evidence, and, therefore, is not a proper part of the pleading in the case. The declaration alleges that the bill of lading was delivered by the defendant to the plaintiff and was signed and accepted by him as hereinbefore stated, but later on it says that the said defendant carried the carload of cattle to Greencastle, Pa., instead of to Lancaster, Pa., without the

knowledge or consent of the plaintiff, by reason of which the plaintiff lost two days in marketing the said shipment of cattle; and the said declaration does not allege any other contract in proper manner and form, except the written contract as stated in the bill of lading, and, therefore, the defendant says the plaintiff is chargeable with the omission of duty, in that he failed to read his contract, and there is no averment in the declaration that the defendant was unable to read or to write or unable to understand and comprehend the terms of the contract if he could have read the same, and, therefore, defendant says that for this reason the declaration is faulty on demurrer.

5th. That the declaration alleges that the defendant's agent, instead of making out a bill of lading to Lancaster, Pa., addressed to John A. Miller as consignee, and as the plaintiff had been given to understand had been done, the agent, by mistake, made out the same to John A. Miller, Greencastle, Pa., and consigned the said carload of cattle to said John A. Miller, Greencastle, Pa., and that the defendant carried said carload of cattle to Greencastle, without the knowledge or consent of the plaintiff. The defendant says by way of demurrer that the contract, being in writing, must speak for itself, and if there was a mistake made by the agent of the defendant it must be corrected in another forum and by another tribunal, and not in this court under the allegations contained in the declaration, the defendant insisting on demurrer that the mistake was in the failure of the plaintiff to read his contract as carefully as he did the lose memorandum made by the defendant's agent, and had he done so the cattle would have gone to Lancaster, Pa., instead of to Greencastle, Pa., if the defendant had been directed to carry said cattle to that point instead of to Greencastle, Pa.

6th. The declaration further alleges, "the said defendant not regarding its said duty to deliver the cattle of the plaintiff in Lancaster, Pa., in accordance with its '*oral contract*,' but, on the contrary thereof, the said defendant so being such common carrier as aforesaid, so carelessly and negligently behaved itself in the premises, that by reason of the carelessness, negligence and default of the defendant in the premises, that the cattle of the plaintiff were not delivered in Lancaster, Pa., for two days after the time the same should have been delivered under the aforesaid *oral contract*," &c.

The defendant says, by way of demurrer, that there is no averment in the declaration that there was any other contract between the plaintiff and the defendant, except the bill of lading, which was in writing, signed by the defendant and also by the plaintiff, and delivered by the defendant to the plaintiff and by him accepted. There is nowhere in the declaration an averment that there was any oral contract at all, and for that reason defendant says the declaration is faulty, the defendant saying that this suit it brought upon the written contract; and, therefore, any statement in the declaration of an antecedent oral understanding between the parties is insufficient in law to do away with the written contract, which was the consummation of the agreement between the parties, because the defendant

says that any talk had between the defendant's agent and the plaintiff precedent to the signing of the bill of lading—the real contract between the parties—was not a part of the contract, had nothing to do with it, and would be inadmissible in evidence were it offered as such by the plaintiff.

7th. Even if the plaintiff directed the defendant's agent to ship the cattle mentioned in the declaration to Lancaster, Pa., instead of to Greencastle, Pa., and the plaintiff loaded his cattle; still, if the plaintiff failed to read the contract between him and the defendant company, the fault was his and one that could have been corrected had he read the contract; and, in any event, the defendant says that the most that can be said is that there were concurrent faults, and being concurrent, the plaintiff cannot recover on his own statement in his declaration.

8th. That the declaration is vague, indefinite, uncertain and lacking in precision in this, at the bottom of the first and top of the second page the declaration apparently declares upon the written contract, namely, the bill of lading between the plaintiff and the defendant, and then on the second page the declaration avers the failure upon the part of the defendant to deliver the cattle in accordance with its *oral contract*, so that the defendant says it is a difficult matter to determine whether the plaintiff intends to base his action upon the written agreement contained in the bill of lading or upon what is called the "oral contract"; if upon the oral contract, then the defendant says there is no averment in the declaration, which shows the terms and conditions of the alleged oral contract, and for that reason there is such an uncertainty and want of precision in the pleading as to render the declaration faulty.

For these and other reasons to be assigned on the argument of the case, the defendant says the plaintiff has no cause of action against it.

MARSHALL MCCORMICK,
JOS. L. DORAN } p. d.

The case coming on and being argued at the June term, 1904, Hon. T. W. Harrison, Circuit Judge, sustained the demurrer and delivered the following opinion:

OPINION.

By the statement of facts contained in the declaration, the bill of lading was signed and accepted by the shipper before his cattle left the Berryville station. At the time he so signed the bill, although the cattle were upon the cars, they were not beyond his recall. There was no fraud or imposition on the part of the agent, and the most that can be said of his conduct is that he carelessly inserted in the bill a wrong destination. It was presented to the shipper, who, with full opportunity for inspection and approval, deliberately signed and accepted the bill. After that the cattle were forwarded (as the company was bound to do) in accordance with the written

contract between the parties. If the agent was negligent, the shipper was no less so.

But a bill of lading is both a receipt and a contract. It is a receipt, so far as acknowledging the receipt of the goods or the freight charges, but it is a contract, so far as the terms of shipment are concerned, and on familiar principles, is the final substitute for all prior oral contracts, and may not be contradicted or varied by parol evidence.

It sometimes happens that a shipper does not sign the bill, and the only evidence of his acceptance of the same is the implication arising from his receiving and holding it without objection. I find in the cases, especially in the New York cases, which are accessible to me, that, under such proof of acceptance, a distinction is drawn between a case in which the bill is delivered to a shipper after the goods are *in transitu,* and a case in which the bill is delivered before the goods have passed out of the control of the shipper.

In the first class of cases the oral contract may prevail, for proof is held lacking that the bill was accepted in lieu thereof, but in the other class, even though the bill is not signed, it is nevertheless conclusive.

The case in suit differs from the first class by the fact of an express acceptance, and it comes within the principle of the second class, as an acceptance of the bill before the goods had passed beyond the shipper's recall.

It would be contrary to the general principles of law and to any case I have examined to permit the evidence of a prior oral contract to alter the terms of the written contract between the parties.

The shipper claims damages for the loss incident to the delay of his cattle in reaching the desired destination, because the carrier delivered them in accordance with a written contract, signed by the shipper before his cattle left the receiving depot, and while they were in the full possession of the contracting agent and himself.

I cannot conceive that the law would impose a liability upon the carrier under any such circumstances, and will, therefore, sustain the demurrer on the grounds filed in writing by defendant.

The plaintiff not amending, a final order was entered in the case in the following words and figures:

IN THE CIRCUIT COURT OF CLARKE COUNTY, VIRGINIA.

R. H. FRASIER

v.

NORFOLK & WESTERN RAILWAY COMPANY.

At the May term, 1904, of the said court, the defendant company demurred to the plaintiff's declaration and filed a written paper assigning the grounds of demurrer, and the plaintiff having joined in said demurrer, and the court not being advised of its judgment, took the said demurrer under advisement for an order in vacation.

Pursuant to the said order, the parties, plaintiff and defendant, this day came in vacation before the said judge, and he, being now advised of his judgment on the said demurrer, doth consider that the said demurrer be, and the same is hereby sustained, and the plaintiff's case dismissed.

It is further considered that the defendant company do recover of the plaintiff its costs by it expended in and about its defense.

The clerk of the Circuit Court of Clarke county, Va., will enter this order in the common law-order book of said court as a vacation order.

Given under my hand this 10th day of June, 1904.

T. W. HARRISON,
Judge of the 17th Judicial Circuit.